IN THE

Supreme Court of the United States

October Term, 1961

No. 236

HARRY LANZA,
Petitioner

—v.—

NEW YORK.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR PETITIONER

LEO PFEFFER
15 East 84 Street
New York 28, N. Y.
Attorney for Petitioner

JACOB D. FUCHSBERG
Of Counsel.

32 CASE PRESS INC., 421 Hudson St., N. Y.—ORegon 5-4540

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

PAGE

Statutes and Constitutional Provisions

Miscellaneous

IN THE

Supreme Court of the United States

October Term, 1961

No. 236

HARRY LANZA,
Petitioner

—v.—

NEW YORK

BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals of the State of New York (R. 300)* is reported at 9 N. Y. 2d 895. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department (R. 292-298) is reported at 10 App. Div. 2d 315. The Court of General Sessions rendered no formal opinion. Its oral decision is contained in the Record at pp. 261-263 and its oral judgment at pp. 268-274.

Jurisdiction

The decision, judgment and remittitur of the Court of Appeals of the State of New York, the highest tribunal in

* References are to pages in the Transcript of Record in this Court.

the State, were entered on April 27, 1961. The remittitur was amended and the amended remittitur (R. 301) was entered on July 7, 1961. A petition for certiorari was filed with the Clerk of this Court on July 17, 1961 and certiorari was granted on November 20, 1961.

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, Petitioner's cause is founded upon rights secured by the Constitution of the United States, and specifically the Fourteenth Amendment thereto.

Constitutional Provisions Relied Upon

The Petitioner relies upon the Fourth and Fourteenth Amendments to the Federal Constitution.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Fourteenth Amendment

Section 1 . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . .

Question Presented

This case raises the single question whether a stay may, consistent with the Fourteenth Amendment to the Federal Constitution, compel a witness before a legislative investigation committee to testify regarding information acquired by the state through the means of an electronic eavesdropping device, concealed in a room at a state penitentiary set aside for conferences between the prisoners and their attorneys and relatives and where the witness conferred with his incarcerated brother.

Statement of the Case

There is no dispute as to the basic facts relevant to the question presented to this Court on this petition.

On February 5th, 1957, Joseph Lanza, brother of the petitioner, herein, was arrested on a warrant charging him with violation of parole (R. 66). Joseph Lanza was thereupon imprisoned in the jail of Westchester County, New York. At the request of New York Parole Board officers, the Sheriff of Westchester County, members of his staff, and officials in charge of the jail installed a concealed electronic microphone, connected to a recording device, in a room in the jail normally set aside for private consultations and conferences between the prisoners, their attorneys, relatives and friends. Between the period from February 5th to February 19th, a number of conversations between Joseph Lanza and his attorney, his wife, and his brother, the petitioner herein, respectively, were thus recorded (R. 175, 170-171; *Lanza* v. *New York State Joint Legislative Committee*, 3 N. Y. 2d 92, 101; Report of the New York Joint Legislative Committee on Privacy of Communica-

tions, Legislative Document (1958) No. 9, 99, 24-25). Specifically involved in this case is the recorded conversation between Joseph Lanza and the petitioner herein held on February 13th, 1958 (R. 8).

On or about February 19, 1957, Joseph Lanza was restored to parole by decision of James Stone, a member of the Parole Board (R. 66). This action by Commissioner Stone gave rise to an investigation by the New York Joint Legislative Committee on Government Operations (hereinafter referred to as the Joint Committee) (R. 65-67, 88-91). The Joint Committee was originally created by a resolution of both houses of the State Legislature in 1955. Its existence was thereafter broadened by action of the Legislature (R. 50-51).

Transcripts of the recorded conversations between Joseph Lanza and his wife, attorney and brother came into the possession of the Joint Committee and each of the four of them was summoned to appear before the Committee for questioning. All four refused to answer questions put to them by counsel for the Committee arising out of the intercepted conversations. No punitive action was taken against either Joseph Lanza or his wife. An effort was made to adjudicate the attorney guilty of contempt but the New York Appellate Division affirmed a lower court decision holding that the attorney was not guilty of contempt in his refusal to answer the questions (*Matter of Reuter (Consentino)*, 4 A. D. 2d 252, 164 N. Y. S. 2d 534).

Harry Lanza, the petitioner herein, was called before the Joint Committee for questioning on three occasions. The first was in executive session, the second at a public session (R. 187). In the course of the second session, the Joint

Committee voted that proceedings to punish him for contempt be instituted against him (R. 95-97, 191-193). Thereafter, on June 19, 1957, he was again called before the Joint Committee and nineteen questions were put to him, all of which he refused to answer (R. 94-107).

The Joint Committee voted to grant immunity to the petitioner, but (on advice of his counsel) the petitioner persisted in his refusal. The petitioner was thereafter indicted for nineteen violations of Section 1330 of the New York Penal Law (refusal to testify before a legislative committee) and, after a trial without a jury, was found guilty on all counts. He was sentenced to imprisonment for one year on each of the counts, but nine of the sentences were ordered to be served consecutively, so that the term for which petitioner was sentenced was ten years (R. 259-273), a sentence modified by the Appellate Division to run concurrently, and as so modified was affirmed (R. 292-298). The Court of Appeals, the State's highest court, affirmed the conviction by a bare majority vote of four to three (R. 300).

Summary of Argument

The conduct of the officials of the State of New York would have constituted a violation of the Fourth Amendment had they been officials of the Federal government and accordingly constitutes a violation of the Fourteenth Amendment. Information secured by such means may not constitutionally be employed by the State of New York for any purpose, including the coerced elicitation of further information.

Even if the action of the State officials cannot be said to constitute a violation of the Fourth Amendment, it is nev-

ertheless conduct that shocks the conscience and offends the community's sense of fair play. As such it violates the due process mandate of the Fourteenth Amendment. Its fruits are tainted and may not be used to coerce further information from the victim of the immoral conduct.

Whether the State's action constitutes an unlawful search and seizure or a violation of the Fourteenth Amendment's inherent mandate of fair play, it is immaterial that the forum which sought to elicit further information from the petitioner was a legislative committee rather than a judicial tribunal. The command of the Bill of Rights extends equally to all agencies of government, legislative no less than judicial.

Nor, under the circumstances of this case, is it material that the first and last questions put to the petitioner by the Joint Committee did not expressly refer to the intercepted conversation or purport to be based thereon. Were it not for that interception the petitioner would never have been called before the Joint Committee or, if called, could not have constitutionally been compelled to answer incriminating questions even if tendered immunity from prosecution.

Argument

I. The use of the electronic device in the jail constituted an unreasonable search and seizure and the information thereby procured could not constitutionally be used by the State of New York to coerce further information.

1. Violation of the Fourth Amendment

The last word spoken by this Court on the compatibility of the use by government of concealed electronic eavesdrop-

ping devices and the right of privacy guaranteed by the Fourth Amendment is to be found in the case of *Silverman* v. *United States*, 365 U. S. 505, decided during the last term of this Court.

In previous cases, the Court ruled that use of these devices did not violate the Federal Communications Act, whose bar is limited to telephone wiretapping. In *Goldman* v. *United States*, 316 U. S. 129 (1942) the Court refused to upset a conviction based upon evidence obtained by means of a detectaphone placed on the wall of an office adjoining the defendant's. In *On Lee* v. *United States*, 343 U. S. 747 (1952) the same result was reached where a microphone was concealed in the clothing of an informer who entered the defendant's store and engaged him in conversation.

In the *Silverman* case the defendants' conviction for gambling in the District of Columbia was based on evidence obtained through the use of a "spike mike," an electronic device connected to a heating duct in the defendants' house, which in effect turned the duct into a giant microphone running through the entire house. The device was inserted into a party wall separating the defendants' house from a vacant house next to it, access to which the Federal agents gained with the consent of the owner.

In arguing against the conviction, the defendants urged the Court to overrule the *Goldman* and *On Lee* cases and hold that any use of a concealed electronic eavesdropping device violated the Fourth Amendment's guaranty against unreasonable searches and seizures. While the Court was unanimous in reversing the conviction, the majority did not find it necessary to go that far. It felt that *Goldman* and

On Lee were distinguishable, although, as the Court pointed out, a "distinction between the detectaphone employed in *Goldman* and the spike utilized here seemed to the Court of Appeals too fine a one to draw" (365 U. S. 505, at 512).

We suggest that the present case affords the Court the opportunity to do what it refused to do in *Silverman*—expressly overrule *Goldman* and *On Lee*. We believe that the time to do so has arrived.

However, as in *Silverman*, it is not necessary to do this in order to reverse the conviction here in issue. The basic principle asserted in *Silverman* is so applicable in the present case that adherence to *Silverman* requires reversal here.

It is important to note that while two of the Justices in *Silverman* concurred in the decision on the ground that the unauthorized physical penetration into petitioner's premises constituted technical trespass, the majority of the Court specifically refused to base the decision on that ground. The majority found it unnecessary "to consider whether or not there was a technical trespass under the local property law relating to party walls." "Inherent Fourth Amendment rights," the Court said, "are not inevitably measurable in terms of ancient niceties of tort or real property law" (365 U. S. 505, at 511).

The basic rationale of *Silverman* lies in governmental intrusion without legal warrant into a place where the citizen has a right to be and has a right to privacy. Whether an action in trespass would survive a demurrer under archaic standards of common law pleading is not the decisive factor. What is decisive is that there is an intrusion into a privacy upon which, according to contemporary standards of morality and decency, the government has no

right to intrude. The term "unreasonable" in the Fourth Amendment has a sweep broader than that measured by technical legalisms.

Silverman, we submit, is indistinguishable from the present case. When the prison authorities in Westchester made available to Joseph Lanza and his visitors space in the jail, that space became Lanza's home. It was a place where he was entitled to privacy and a place where government had no lawful right to intrude.

Actually, the wrong committed by the government in the present case was more egregious than that committed in *Silverman*, and the search and seizure more unreasonable here than there. In *Silverman* there was no more than a surreptitious intrusion upon privacy. There was there no misrepresentation, no deception, no breach of a relationship of trust. The government in *Silverman* did not provide the defendants there with a place to meet and confer; it did not impliedly—but realistically—assure them of privacy. They were free to meet and confer wherever they wished.

In the present case Joseph Lanza was the ward of the State of New York. He could not choose for himself a place to confer with the petitioner and others in privacy and confidence. The State supplied him with such a place and implicitly but actually represented to him and to those that conferred with him that they could do so in privacy and confidence. In *Silverman* there was but trespass (in the broad sense of the word); here there was trespass and breach of trust. If the conduct in *Silverman* was a violation of the Fourth Amendment, the conduct here was much more so.

2. The Fourth Amendment and the States

Whatever doubts may have previously existed, *Mapp* v. *Ohio*, 367 U. S. 643 (1961) now makes it certain that the Fourth Amendment's right of privacy is enforceable against the States through the due process clause of the Fourteenth. Conduct forbidden to the Federal government by the Fourth Amendment is forbidden to the States by the Fourteenth.

It follows from this that since the conduct committed by the State authorities in the present case would have constituted a violation of the Fourth Amendment had it been committed by Federal authorities, it necessarily constitutes a violation of the Fourteenth having been committed by State authorities.

It follows too from the *Mapp* case that the information so procured by the State of New York could not constitutionally be used by it to coerce further information. The New York Court of Appeals' per curiam affirmance did not discuss the substantive issues of the case, limiting itself to the question of the correctness of the sentence. The Appellate Division, however, indicated clearly that the basis of its decision was that "Material evidence obtained by illegal means is nevertheless admissible" (R. 295), and it may be assumed that this too was the basis of the affirmance by the majority of the Court of Appeals.

As we will seek to indicate later, even before the *Mapp* case this did not constitute a correct statement of the applicable Federal constitutional law as expressed by this Court. The standards of due process imposed upon the States by the Fourteenth Amendment would preclude use of the immorally acquired information even if the mandate of the Fourth Amendment were not applicable to the States.

However, *Mapp* v. *Ohio* makes it clear not only that conduct forbidden to the Federal government by the Fourth Amendment is likewise forbidden to the States by the Fourteenth, but also that information obtained by a State in violation of the Amendment may not be used against the consent of the person wronged by the violation. What the Court said in *Mapp* (367 U. S. 463), is particularly pertinent here:

> "The ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by State officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."

It need hardly be stressed that it is constitutionally immaterial that the information illegally acquired herein was sought to be used initially by a legislative committee rather than a judicial tribunal. In the first place, the legislature was unable to elicit the sought information by itself and

found it necessary to invoke the coercive powers of the judiciary. In such case, assistance by the judiciary in this endeavor would make it a partner to the violation of the Fourth Amendment. As Mr. Justice Brandeis said in his dissenting opinion in *Olmstead* v. *United States* (277 U.S. 438, 483): "When the Government, having full knowledge, sought through the Department of Justice, to avail itself of the fruits of these acts in order to accomplish its own ends, it assumed moral responsibility for the officers' crimes (citing cases). And if this Court should permit the Government by means of its officers' crimes to effect its purpose of punishing the defendants, there would seem to be present all the elements of a ratification."

In the second place, th ndate of the Fourth and Fourteenth Amendments extends to all agencies of government. Indeed, as the opening words of the Bill of Rights ("Congress shall make no law") indicate, it was the legislature that was first in the minds of the authors. The basic guaranties of the Fifth Amendment, particularly the ban on coerced confessions, is applicable to legislative committees no less than to judicial tribunals, even though the Fifth Amendment, unlike the Fourth, has the apparently limiting words "in any criminal case." *Blau* v. *United States*, 340 U.S. 159 (1950); *Emspack* v. *United States*, 349 U.S. 190 (1955); *Quinn* v. *United States*, 349 U.S. 155 (1955). There is at least as much reason to subject legislatures to the limitations of the Fourth Amendment as of the Fifth. The right of privacy, that most important of rights of civilized men, is as vulnerable to invasion by legislative investigating committees as by prosecuting officials, and requires constitutional protection in the one case no less than in the other.

In any event, our concern here is with the Fourth Amendment as rendered applicable to the States by the Fourteenth. That amendment, it need hardly be noted at this late date, extends to every organ of State government, legislative no less than judicial or executive.

II. The conduct engaged in by the State of New York did not measure up to the standards of due process and the information thus procured could not constitutionally be used by the State to coerce further information.

I. The Immorality of the State's Conduct

The action of the State officials in causing the conversations between Joseph Lanza and his wife, brother and attorney to be electronically intercepted and recorded in the Westchester County jail was immoral and reprehensible. There is hardly a forum which has reacted to it that has not been shocked by it and has not condemned it.

The Appellate Division, in its opinion of affirmance assumed that the action was "reprehensible and offensive" (R. 295). Earlier it had called the action "gross and inexcusable" (*Lanza* v. *New York State Joint Legislative Committee*, 3 A. D. 2d 531), and "flagrant and unprecedented" (*Matter of Reuter (Consentino)*, 4 A. D. 2d 252, 255, 164 N.Y.S. 2d 534). The Court of Appeals had characterized it as a "gross wrong" (*Lanza* v. *New York State Joint Legislative Committee*, 3 N.Y. 2d 92, 101). Counsel for the Joint Committee commendably made no effort to justify or even excuse the action, but on the contrary has himself called it "repulsive and repugnant" (Ibid). The governor of the State called it "unwholesome and dangerous" (McKinney's 1958 Session Laws of New York, p. 1875). The Chairman of the New York Joint Legislative

Committee on Privacy of Communications called the incident "deplorable" and reported that it had "brought forth a storm of protest from lawyers, some of whom had not previously been audibly concerned about . . . efforts to protect the people's right of privacy" (Report of the New York Joint Legislative Committee on Privacy of Communications, Legislative Document (1958) No. 9, p. 25).

It was reported that after the incident at the Westchester County jail became public, a New York judge found it necessary to release a prisoner held without bail so that he would have an opportunity to consult with his attorney, since the judge could not be sure that there was any jail in the State where the prisoner could feel secure against electronic eavesdropping (New York Times, June 26, 1957, p. 64, col. 1, cited in Comment: "Abolition of Eavesdropping Exception to the Attorney-Client Privilege," 27 Fordham Law Review 390 (1958)). It was also reported that after the incident became known, the State Commissioner of Correction warned all sheriffs and jail wardens that eavesdropping on persons is illegal ("The Past is Prologue," 38th Annual Report of the American Civil Liberties Union (1957-1958), p. 84).

The most striking indication of the extent and degree to which the conscience of the community was shocked by the incident at the Westchester County jail was the New York State Legislature's amendment of Article 73 of the Penal Law, entitled "Eavesdropping," by Chapter 881 of the Laws of 1957.[1] This statute made it a criminal offense to

[1] Penal Law Section 638 provides in part:

A person: . . .

2. not present during a conversation or discussion who wilfully and by means of instrument overhears or records such conversation or discussion, or who aids, authorizes, employs, procures or permits another to do so, without the consent of a party to such conversation or discussion; . . . is guilty of eavesdropping.

do what the Westchester County jail officials did. A number of important points, all relevant to this case, must be noted in respect to the statute and its enactment.

First, the statute was enacted with remarkable speed after the Westchester County jail incident became known. The incident became public towards the end of February, 1957. On March 21st (before the petitioner herein was questioned by the Joint Committee), a conference was held between leaders of the Legislature and Counsel to the Governor and the text of the proposed law was agreed upon (Report of New York State Joint Legislative Committee to Study Illegal Interception of Communications, Legislative Document (1957 No. 29, p. 28). The bill was then quickly adopted by the Legislature and approved by the Governor, as Chapter 881 of the Laws of 1957 (Ibid, p. 34). The speed with which the statute was adopted after the incident became known—a speed which can be explained only in terms of spontaneity—attests to the deep revulsion experienced by the people of New York by reason of the incident. If, as it is generally assumed, law reflects the moral standards of the community, there can be little doubt that the people of the State of New York deemed the conduct of the jail officials to be grossly immoral.

Second, it was not, as the Appellate Division seems to imply (R. 295-296) and the State of New York argues here, the infringement on the attorney-client relationship, or even the husband-wife relationship that shocked the public conscience. The statute made electronic eavesdropping a crime without regard to the relationship between the persons whose private conversation was electronically intercepted.

Third, the Legislature, reflecting the indignation of the public, left no doubt as to who was intended to be encompassed by the prohibition. In language for which we have been unable to find any precedent, Section 741 expressly defines the word "person" to include "any law enforcement officer." A more emphatic repudiation of the conduct of the jail officials can hardly be conceived.

Fourth, and perhaps most important, the intensity of public revulsion is attested by the fact that electronic eavesdropping was made not merely a crime, but a felony.

It is not merely interesting, but significant and instructive to compare that fact with the fact that the crime with which the petitioner herein was charged is only a misdemeanor. It is not unreasonable to suggest that public policy and morality would be better served if a misdemeanor were to remain unpunished than if conduct deemed felonious should be committed by State officials.

This conduct was an act of gross or aggravated immorality, that is, it was doubly wrong. In the first place, it was an act of electronic eavesdropping, an invasion of privacy which has long been deemed offensive by American public opinion. In the second place, it constituted an act of wilful deception and entrapment, a betrayal of a fiduciary relationship and a breach of trust.

Electronic eavesdropping is the latest development in the reprehensible art of wiretapping. This has been well stated by the New York State Joint Legislative Committee to Study Illegal Interception of Communications (Legislative Document (1957) No. 29, p. 15):

> "It was soon after the introduction of the telephone that our legislators in 1892 recognized the

danger of eavesdropping and made it a felony to tap a telephone wire. Their alertness has been justified by later events. In more recent times we have not been as foresighted as they.

"Lately the art of electronics has made great advance. Microphones, sound recorders, and transmitters have become compact and supersensitive. Technically it is easy to secrete a microphone in a room and overhear what goes on there. Such surveillance has become a commonplace of fact and fiction, particularly with respect to the police states of Europe. It causes revulsion in all of us."

Article 73 of the Penal Law places electronic eavesdropping and wiretapping in the same category of offense. Wire tapping, as indicated above, has been a felony in New York almost as long as the telephone has been in use. Forty years ago, Mr. Justice Holmes called wiretapping a "dirty business" (*Olmstead* v. *United States*, 277 U.S. 438, 470 (1928)), and that phrase has become so popular in characterizing wiretapping as to indicate universal agreement with it in the American democratic community. Mr. Justice Brandeis, referring to abuses which in a large measure motivated our War for Independence, expressed the opinion that "writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping" (Ibid, p. 476). A Committee of the United States Senate characterized wiretapping as an "unethical device" that "may lead to a variety of oppressions that may never reach the ears of the courts" (Sen. Rep. No. 1304, 76th Cong. 3d Sess. (1940)). Mr. Justice Douglas expressed approval of Mr. Justice Brandeis' characterization of wiretapping as "the most oppressive intrusion into the right of privacy that man had yet in-

vented." Wiretapping, he said, "wherever used, has a black record. Its invasion of privacy is ominous. It is dragnet in character, recording everything that is said, by the innocent as well as by the guilty. It ransacks their private lives, overhears their confessions and probes their innermost secrets" (Douglas, Almanac of Liberty, 353, 355).

These are but a representative few of the hundreds of instances that might be cited of similar condemnations of wiretapping and electronic eavesdropping as practices obnoxious to American concepts of fairness and decency. Professor Robert E. Cushman of Cornell summed it up by stating that in the United States there is "a widely held conviction that wiretapping is a dishonorable enterprise, a device of totalitarian governments with which our government should not contaminate itself" (Cushman, Civil Liberties in the United States, 140. See also, Rosenzweig, The Law of Wire Tapping 32 Cornell L. Q. 514, 33 Cornell L. Q. 73 (1947); Westin, The Wire-Tapping Problem, 52 Col. L. R. 215 (1952); Wiretapping, Eavesdropping, and the Bill of Rights, Hearing Before the Subcommittee on Constitutional Rights of the Committee of the Judiciary of the United States Senate pursuant to S. Res. 234, 88th Congress, Second Session (1958)).

The fact of electronic eavesdropping is but one aspect of the immorality committed at the Westchester County jail; the other lies in the betrayal of the trust which the jail officials impliedly sought and received from Joseph Lanza and his family. The Chairman of the New York Joint Legislative Committee on Privacy of Communications was both accurate and vivid when he stated that "at the request of Parole Board officers, a 'bugging' trap was set for Lanza

and his family." (N. Y. Legislative Document (1958) No. 9, p. 24.) The jail officials could have refused to allow Joseph Lanza to communicate with his family. Or they could have insisted that a jail official be present during the conversation, or even perhaps that a court stenographer be present to record stenographically what was said by Lanza and his family. They did none of these things. Instead they supplied Lanza with a room and impliedly but very really represented to him that he could converse with his family there with the freedom of privacy.

This was a misrepresentation, an act of fraud. Even worse, it was a betrayal of a fiduciary relationship. Joseph Lanza was in the control and custody of the jail officials. He could not leave to converse with his family in the privacy of his home. He was in a literal sense the ward of the warden of the jail; he had only such liberty of communication as was accorded to him by the warden. In such a situation, and particularly in view of the fact that the warden was a public official, a duty was owing higher than the "morals of the marketplace" (cf. *Meinhard* v. *Salmon*, 249 N. Y. 568).

It is true that the relationship of trust was to Joseph Lanza and that it is his brother, Harry, who is the petitioner in this case. But the representation was made not only to Joseph Lanza but to Harry as well. And, more important, unless the ambit of protection encompasses those who conversed with Joseph Lanza it would be an illusory protection for him. It would be of little benefit to him that he could not lawfully be coerced into testifying in respect to the conversation, if the other party to the conversation could be (*Matter of Reuter (Consentino)*, 4 A. D. 2d 252, 164 N. Y. S. 2d 534; cf. *Barrows* v. *Jackson*, 346 U. S. 249,

255-259; *National Association for the Advancement of Colored People* v. *Alabama*, 357 U. S. 449, 459).

II. The Relevance of Morality

The State's prosecuting attorney, who like counsel to the Joint Committee, is to be commended for making no effort to justify or excuse the electronic eavesdropping at the jail, nevertheless took the position apparently accepted by the courts below, that the immorality of acquisition was irrelevant to the petitioner's duty to answer. He said: "This trial is not held for any moral evaluation. . . . That is not the issue here, whether it is morally offensive or repugnant between us. The question is, is the evidence legally admissible" (R. 209). "We are not," he said, "concerned with the morality of the practice alluded to" (R. 258).

The Appellate Division adopted this contention and held that "Material evidence obtained by illegal means is nevertheless admissible" (R. 295). We submit that the moral issue cannot be so easily disposed of. Morality is not divorced from law. Ever since the patriarch Abraham peaded with God, "Shall not the Judge of all the earth do what is right?" (Genesis 18:25), man has recognized a duty on the part of sovereignty to act morally towards its subjects. Where the sovereignty is a democracy, which is the servant of and responsible to its citizens, the duty becomes a binding obligation, whether imposed by constitution, statute or common law. The "clean hands" doctrine, developed by the branch of the Anglo-American legal system which has traditionally reflected the conscience of the sovereign, rests on the principle that the law will not allow it-

self to be used as a means to further immoral ends. This Court has held that the "equal protection of the laws" clause of the Fourteenth Amendment forbade a state to allow its legal machinery to be used to further the immorality of racial discrimination through the enforcement of racial restrictive covenants (*Shelley* v. *Kraemer*, 334 U. S. 1). Although the Constitution contains no "equal protection" clause addressed to the Federal government, the Court nevertheless refused to permit the Federal courts to enforce such a covenant because the obligation of morality on the part of government extends beyond specific constitutional or statutory language (*Hurd* v. *Hodge*, 334 U. S. 24).

In *Lanza* v. *New York State Joint Legislative Committee* (3 N. Y. 2d 92), all seven Judges of the Court of Appeals expressed revulsion at the conduct of the State officials responsible for the interception. Three of the seven felt so strongly about it that they would have applied the truly extraordinary and unprecedented remedy of enjoining the Joint Committee from making public the contents of the recording. The other four, a bare majority, felt that under the principle of division of powers among the several branches of our government, the judiciary could not by injunction interfere with the functions of the legislature acting within its jurisdiction.

But the principle of division of powers has reciprocal obligations of restraint. If the judiciary cannot enjoin the legislature from publicizing or utilizing the recording notwithstanding the immorality of its acquisition, neither can the legislature compel the judiciary to be party to the immorality by coercing replies based on the recording. If this were not so, we would have the English system of legis-

lative omnipotence rather than the American system of an independent judiciary with a right and indeed a duty to review the acts of the legislature to determine not merely if they conform to constitutional requirements but also to the basic principles of morality that underlie all constitutions.

III. Morality and Due Process of Law

We submit that the due process clause imposes a mandate of morality upon government, and that the immorality of the acquisition of the information here in issue precludes its use by government.

In *Wolf* v. *Colorado* (338 U. S. 25), this Court defined "due process of law" as "the compendious expression for all those rights which the courts must enforce because they are basic to our free society." Foremost of these rights, said Mr. Justice Brandeis, is the right of privacy, "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men" (*Olmstead* v. *United States*, 277 U. S. 438, 478).

"The security of one's privacy against arbitrary intrusion by the police," the Court said in *Wolf* v. *Colorado*, *supra*, "is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause . . . Accordingly, we have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment."

In *Rochin* v. *California* (342 U. S. 165), the Court unanimously upset a State conviction based upon use as evi-

dence of morphine tablets forcibly removed from the defendant's stomach by means of a pump. Much of the language used by the Court in that case is particularly appropriate here:

> "However, this Court too has its responsibility. Regard for the requirements of the Due Process Clause 'inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings (resulting in a conviction) in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking people even toward those charged with the most heinous offense.' These standards of justice are not authoritatively formulated anywhere as though they were specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which, as Mr. Justice Cardozo twice wrote for the Court, are 'so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty.'
>
> * * * * *
>
> "Applying these general considerations to the circumstances of the present case, we are compelled to conclude that the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically. *This is conduct that shocks the conscience.* . . .
>
> "It has long since ceased to be true that due process of law is heedless of the means by which otherwise relevant and credible evidence is obtained . . . (Due process imposes) *the general requirement that the States in their prosecutions respect certain decencies of civilized conduct*" (p. 169-173). (Emphasis added.)

Due process of law, the Court said further in the *Rochin* case, bars use by the State of information acquired by methods that "offend the community's sense of fair play." The due process clause came into our constitutions as the culmination of a long struggle to impose upon government those obligations of decency and fair play that the community has the right to expect from the agency of society which fixes by the force of law the moral standards of the community. (See, Pfeffer, The Liberties of an American, 153-159.)

We do not believe that the *Rochin* case can be distinguished on the ground that in that case force was used whereas here we have only guile. In the first place, there is little to choose between force and fraud in the hierarchy of immorality; they are equal in the extent to which they shock the conscience of the democratic community and offend our Anglo-American sense of justice and civilized conduct. In the second place, it is not entirely correct to say that force is absent from the present case; it is more accurate to say that force has been added to fraud. What was begun by deceit was sought to be carried forward by force. To the concealed microphone there had been added the revealed threat of nineteen years imprisonment. In th *Rochin* case the act of force took place in a hospital ward; in the present case it took place in the hearing room of the Association of the Bar in the City of New York. What is involved in the present case is not (as in the *Rochin* case) merely the admissibility or inadmissibility of immorally acquired evidence; what is involved is the power of the State to aggravate and extend the immorality by forcing testimony based on the evidence. We submit that such conduct is no less offensive to concepts of justice and fair play than was the conduct in the *Rochin* case.

However, the conclusive answer to any contention that in the absence of brute force there can be no violation of the "due process" clause is to be found in the case of *Leyra* v. *Denno* (347 U. S. 556), a case which, we suggest, presents exactly the same issues of constitution and conscience that are found in the present case. In that case a confession was obtained in a police station through apparently sympathetic and solicitous interrogation by a psychiatrist who was introduced to the suspect by the police as a physician who was going to give him medical relief from his mental sufferings. Police officials were secreted in an adjoining room and were able by means of an electronic microphone and recording machine (as in the present case) to listen to and record the conversation between the two. At the conclusion of the conversation, the officials immediately came into the room and, on the basis of the admissions of guilt made orally to the psychiatrist, they were able to induce the accused to sign a full confession. The Court found the fundamental facts in the case to be indistinguishable from those in the *Rochin* case, and held violative of the "due process" clause not only use of the recorded transcript of the oral conversation, but also the written confession that emanated from it.

Leyra v. *Denno*, we submit, is indistinguishable from the present case. In both guile and deceit rather than force was utilized. In both a relationship of trust existed. In both the immorality at the source tainted the secondary product (the signed confession in *Leyra*, the questions put to the petitioner in the present case). *Leyra* v. *Denno*, we submit, requires reversal of the judgment herein.

The prosecuting attorney laid great stress in the trial on the fact that the action of the Westchester County jail

officials was not illegal or criminal when it took place (R. 259). The Appellate Division, too, appears to have considered that fact to be significant (R. 295). We submit that this was error.

Insofar as the due process clause of the Fourteenth Amendment is concerned, the fact that no state statute has been violated is, if not irrelevant, certainly not determinative. Indeed, the entire purpose of the Amendment was to forbid conduct that state law permitted. The Amendment would be meaningless if its mandate could be avoided by the simple process of enacting a State statute legalizing what would otherwise be a deprivation without due process.

That, at least, is how this Court has consistently interpreted the Fourteenth Amendment. In *Powell* v. *Alabama* (287 U.S. 45), the Court held that the "due process" clause was violated by the failure of a State to accord a defendant's counsel in a criminal case adequate time to prepare for trial, even though the conduct of the trial court was completely consistent with State law. In *Chambers* v. *Florida* (309 U.S. 227), the Court set aside, as violative of due process, a conviction based upon a confession obtained from a prisoner who had been held incommunicado even though no state law was violated thereby. Most important, in *Leyra* v. *Denno*, which is so close on its facts to the present case, there was no violation of the State's criminal law in the action either of the psychiatrist or the police officials.

Both the Appellate Division (R. 295-296) and the trial judge (R. 260) held that the illegality or immorality of the method by which evidence is obtained does not render

it inadmissible in a criminal proceeding. Presumably, the Court of Appeals accepted this holding. We admit that application of this principle to the case at bar was erroneous for two reasons.

In the first place, it is not always true that the admissibility of evidence is not dependent upon the method of its acquisition. *Rochin* v. *California*, *Leyra* v. *Denno*, *Powell* v. *Alabama*, *Chambers* v. *Florida*, and a host of other cases (see, Pfeffer, The Liberties of an American, chapter 6), establish fairly conclusively that evidence acquired by means that shock the conscience or are beyond the limits set by our concept of ordered liberty are not admissible in a criminal proceeding. In the present case, we believe that the conduct of the Westchester County jail officials was no less reprehensible and no less beyond the concept of ordered liberty than the conduct condemned in the *Rochin*, *Leyra*, *Powell*, *Chambers* and other cases.

In the second place, the issue here is not the admissibility of evidence. The New York decisions (*People* v. *Adams*, 176 N.Y. 351; *People* v. *Defore*, 242 N.Y. 13; *People* v. *Richter's Jewels*, 291 N.Y. 151; *People* v. *Variano*, 5 N.Y. 2d 391, 394; *People* v. *Oinan*, 7 A.D. 2d 119, aff'd 6 N.Y. 2d 715) relied upon by the Appellate Division (R. 295-296) rest upon a situation in which the illegality or immorality has been completely consummated when the issue of admissibility arises. The evil has been done and the only question is whether a jury may or may not take cognizance of information that resulted therefrom. In balancing "the social need that crime shall be repressed" against "the social need that law shall not be flouted by the insolence of office" (*People* v. *Defore*, 242 N.Y. 13, 24-

25), the New York courts have, unlike the Federal courts, decided in favor of the former need. But they have decided so only to the extent of allowing the evidence to be placed before the jury by the prosecutor. They have never gone so far as to compel the victim of the wrong actively to participate in its extension. They have never held that the immorally acquired evidence could legally be used to coerce further information from him.

The New York courts have long recognized that the use of tainted evidence to procure a conviction is evil. They have felt constrained to permit its use as a necessary evil in order to detect and punish criminals and thereby deter further commission of crime. We submit, however, that the evil should be confined to its necessity. It should not be extended by expansion through further questioning. Above all, it should not be extended by coercing participation in its expansion by the victim of the evil.

As Mr. Justice Frankfurter said in *On Lee* v. *United State* (343 U.S. 747, 758-759):

> "The law of this Court ought not be open to the just charge of having been dictated by the 'odious doctrine', as Mr. Justice Brandeis called it, that the end justifies reprehensible means. To approve legally what we disapprove morally on the ground of practical convenience is to yield to a short-sighted view of practicality. . . . The contrast between morality professed by society and immorality practiced on its behalf makes for contempt of law. Respect for law cannot be turned off and on as though it were a faucet."

In any event, *Mapp* v. *Ohio*, *supra*, makes it quite clear that the New York decisions cited by the Appellate Divi-

sion are no longer determinative and that a State may not, consistent with the Fourteenth Amendment, use immorally acquired evidence against the victim of the immorality.

III. Absence of express reference to the intercepted conversation in the first and last questions put to the petitioner does not remove the taint of immorality or avoid the ban of the Fourteenth Amendment.

In its brief in opposition to the petition for certiorari herein the State of New York laid major emphasis (it was Point I of the brief) on the claim that since the first and nineteenth questions put to the petitioner were general and did not specifically refer to the intercepted conversation, the conviction herein can be sustained irrespective of the infirmity of the other counts of the indictment.[2] This, we submit, is erroneous.

It is important to note that every question asked the petitioner was inextricably connected with and grew out of the information gained through the eavesdropping. Had there been no eavesdropping, the petitioner would never have been called to testify before the Joint Committee. Indeed, had there been no eavesdropping it is highly doubtful that the petitioner could constitutionally have been coerced to testify before the Committee. In upholding contempt convictions against witnesses subpoenaed to appear before

---

[2] The first question was: "Q. On February 5, 1957, your brother Joseph Lanza was arrested and returned to prison charged with a violation of parole. Tell the committee, please, any and all efforts extended by you to assist in obtaining the release of your brother Joseph Lanza on parole or his restoration to parole." (R. 6)

The last question was: "Q. Mr. Lanza, please tell the name of anybody with whom you spoke during the month of February 1957 about the restoration to parole of your brother Joseph Lanza?" (R. 30)

legislative investigating committees, this Court has stressed that the witnesses were not called before the committees as part of a dragnet procedure but that in each case there were reasonable grounds for believing that the particular witness called had information relevant to the inquiry being conducted by the committee.[3] But for the intercepted conversation, the Joint Committee would have had no grounds for believing that the petitioner had such information. Petitioner was a reputable business man with no prior criminal record (R. 297). Other than the intercepted conversation, the only thing that connected him with the subject of the Joint Committee's investigation was the fact that he was Joseph Lanza's brother and visited him once in jail—a natural fraternal act hardly sufficient to constitute reasonable ground for belief that he had information relevant to the inquiry.

We submit that subsidiary or derivative questions asked of the petitioner stand on no different ground from those that repeat the intercepted conversation *in haec verba*. As

---

[3] Cf. *Wilkinson* v. *United States*, 365 U.S. 399, 412 ("It is to be emphasized that the petitioner was not summoned to appear as the result of an indiscriminate dragnet procedure, lacking in probable cause for belief that he possessed information which might be helpful to the subcommittee. As was made clear by the testimony of the Committees's Staff Director at the trial, the subcommittee had reason to believe at the time it summoned the petitioner, that he was an active Communist leader engaged primarily in propaganda activities. This is borne out by the record of the subcommittee hearings, including the content of the Staff Director's statement to the petitioner and evidence that at a prior hearing the petitioner had been identified as a Communist Party member."); *Braden* v. *United States*, 365 U.S. 431, 435 ("The subcommittee had reason to believe that the petitioner was a member of the Communist Party and that he had been actively engaged in propaganda efforts."); *Uphaus* v. *Wyman*, 360 U.S. 72, 79 (". . . the Attorney General had valid reason to believe that the speakers and guests at World Fellowship might be subversive persons within the meaning of the New Hampshire Act.").

this Court stated in *Nardone* v. *United States* (308 U. S. 338, 341), "the knowledge gained by the Government's own wrong cannot be used by it simply because it is used derivatively." Or, as stated in *Silverthorne Lumber Co.* v. *United States* (251 U. S. 385, 392), "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that the evidence so acquired shall not be used before the court, but that it shall not be used at all." In *Legra* v. *Denno*, *supra*, the Court held violative of the due process clause not only use of the recorded transcript of the oral conversation, but also the written confession that emanated from it.

We submit that the State of New York could not constitutionally purge itself of its immorality or immunize itself from the operation of the Fourteenth Amendment by the expedient of sandwiching the seventeen patently tainted questions between an apparently innocuous first and last question. Constitutional obligations would be meaningless if they could so easily be evaded.

CONCLUSION

For the reasons set forth herein the conviction of petitioner should be reversed and the indictment against him dismissed.

Respectfully submitted.

Leo Pfeffer
15 East 84 Street
New York 28, N. Y.
Attorney for Petitioner

Jacob D. Fuchsberg
Of Counsel.